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No. 80-1955

IN THE

Supreme Court of the United States

OCTOBER TERM,1980

CARTER COUNTY FISCAL COURT, LOWELL "GENE" CLINE, CARTER COUNTY JUDGE-EXECUTIVE, AS ITS CHAIRMAN; CHARLES WILBURN, JAMES WILBURN, JOHN PENNINGTON, JASON BRADLEY, RICHARD SHORT, INDIVIDUALLY and AS MEMBERS OF THE CARTER COUNTY FISCAL COURT, *Appellants,*

v.

CARTER PUBLIC LIBRARY DISTRICT, BOARD OF TRUSTEES, ROBERT L. CAUMMISAR, EDITH STROTHER, MYRTLE LEMASTER, JANIE QUALLS and SARAH LEWIS, AS TRUSTEES OF THE CARTER COUNTY PUBLIC LIBRARY DISTRICT and INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, *Appellees,*

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether KRS 173.720 is violative of the Due Process or Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States (on its face or as applied) inasmuch as governmental powers and performing important governmental functions with significant effect on all citizens residing in the library district (including the powers to impose ad valorem property taxes), is created by petition of a minority of the registered voters of the district, without notice or electoral participation by the other voters of the district or their elected representatives?

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Corpus Juris Secundum 12

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ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

JURISDICTIONAL STATEMENT

Carter County Fiscal Court, Lowell "Gene" Cline, Carter County Judge-Executive, as its Chairman; and Charles Wilburn, James Wilburn, John Pennington, Jason Bradley, Richard Short, individually and as members of the Carter County Fiscal Court, appeal from the final judgment of the Supreme Court of Kentucky, entered February 17, 1981, holding that section 173.720 of the Kentucky Revised Statutes authorizing the creation of a

library district with ad valorem taxing powers by petition of less than a majority of the eligible voters, without notice or opportunity to be heard or vote being given to other voters, does not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

Appellants submit this jurisdictional statement to show that this Court has jurisdiction of the appeal and a substantial federal question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky, which appears in the appendix hereto, p. la, *infra*, is unreported. The opinion of the Kentucky Court of Appeals is set forth in the appendix hereto at p. 2 a., *infra*. The unreported judgment of the Carter Circuit Court is set forth in the appendix at p. 7 a, *infra*.

JURISDICTION

The opinion of the Supreme Court of Kentucky, reinstating the judgment of the Carter Circuit Court and sustaining the validity of KRS 173.720 against appellants' attack on same as being repugnant to the Equal Protection and Due Process clauses of the Fourteenth Amendment, was entered on February 17, 1981. See p. la, *infra*.

A notice of appeal to this Court was duly filed in the Supreme Court of Kentucky on May 15, 1981. See p. 12 a, *infra*.

The jurisdiction of the United States Supreme Court to hear this appeal rests upon 28 U.S.C. §1257(2). This appeal is being docketed in this Court within ninety days from entry of the opinion below.

THE STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES
AMENDMENT 14

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

173.715. County or counties may become library district. – All of the territory in a county, or in two (2) or more counties contiguous to each other may be organized into a public library district for the purpose of levying a tax to pay for establishing, equipping, maintaining and administering libraries, or for contracting for library service from any existing library. (Enact. Acts 1964, ch. 92, § 2.), as found in Volume 7, p. 877, of the Official Edition printed by The Bobbs-Merrill Company, Inc.

173.720. Organization of district – Procedure – Petition – Tax levy. – Districts shall be organized in the following manner:

(1) Upon the filing of a duly certified petition of fifty-one percent (51%) or more of the number of duly qualified voters who voted in the last general election in each county to be included within the territorial limits of the proposed district, the fiscal court of each county in the proposed district shall adopt a resolution ordering the levy of a tax of not more than twenty cents (20¢) on each one hundred dollars ($100) worth of property assessed for local taxation. Such petition shall be filed with the fiscal court in each county in the proposed district not later than ninety (90) days after the date of the first signature on the petition. A certified copy of the order of the fiscal court shall be filed within thirty (30) days with the county clerk who will add the levy to the next annual tax bill of the county or counties concerned.

(2) The petition shall be in substantially the following form:

The following duly qualified voters of (insert name of county or counties) hereby petition the fiscal court of each county concerned to establish a public library district for (insert name of county or counties) which shall have the authority to impose a special ad valorem tax of (insert exact amount) on each one hundred dollars ($100) worth of property assessed for local taxation in the district for the maintenance and operation of the (insert name) public library district.

(3) The petition shall contain the following: The name and address of each petitioner and the date upon which he signed the petition.

(4) All special ad valorem taxes authorized by KRS 173.710 to 173.800 shall be collected in the same manner as are other county ad valorem taxes in each county affected and shall be turned over to the

board as the governing body of the district. The special ad valorem tax shall be in addition to all other ad valorem taxes. (Enact. Acts 1964, ch. 92, § 3; 1978, ch. 384, § 298, effective June 17, 1978.), as found in Volume 7, p. 885-886 of the Official Edition published by the Bobbs-Merrill Company, Inc.

The remaining sections of KRS Chapter 173 which are pertinent to the case are found in Volume 7, pgs. 886-895 of the Official Edition as published by The Bobbs-Merrill Company, Inc. and the 1980 Supplement, pgs. 178-181; and are set forth in the Appendix, *infra.*

STATEMENT OF THE CASE

A) Material Facts

This case involves a dispute concerning the purported creation of a Public Library District for Carter County, Kentucky. Such a district under Kentucky law may be organized "for the purpose of levying a tax to pay for establishing, equipping, maintaining and administering libraries." KRS 173.715, *supra.*

After organization, the library district board is empowered, without further authorization or approval, to impose a special ad valorem tax which "shall be in addition to all other ad valorem taxes." KRS 173.720, *supra.*

Kentucky statutes provide two alternative means for the organization of such a taxing district. The first, as established in 1960 and set forth in KRS 173.470, has been described by Kentucky courts as "the ballot method."[1] The second, established four years later, in 1964, has been dubbed "the petition method."[2].

The Supreme Court of Kentucky has construed each of these methods to be "symmetrical, complete and independent" of the other, and has summarized the differing statutory provisions:

> "The General Assembly has provided two methods by which a public library district may be organized, financed, operated and dissolved:

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[1]See *Board of Trustees of the Henderson-Henderson County Public Library et al. v. Henderson County Fiscal Court,* Ky., 549 S.W. 2d 828 (1976), *aff'd sub nom, Crafton v. Board of Trustees of the Henderson-Henderson County Public Library,* 554 S.W. 2d 82 (1977).

[2]*Wayne Public Library Board of Trustees v. Wayne County Fiscal Court,* Ky., 572 S.W. 2d 858 (1978)

"(1) THE BALLOT METHOD: Upon the filing of a duly certified petition of one hundred or more qualified voters in each county to be included within the district, the Fiscal Court of that county *shall* adopt a resolution submitting the issue of estblishing the district and imposing a special ad valorem tax for its maintenance and operation to the voters at the next general election. The district is established and the tax imposed upon a favorable majority vote. Such a district may be dissolved by a similar process. KRS 173.450 through KRS 173.650 (emphasis by the Court).

"(2) THE PETITION METHOD: Upon the filing of a duly certified petition for establishment of the district and imposition of a special ad valorem tax for its maintenance and operation by fifty one percent or more of the number of duly qualified voters who voted in the last general election in each county to be included within the district, the Fiscal Court of that county *shall* adopt a resolution imposing the tax. The district is established upon the filing of a valid petition. Such a district may be dissolved by a similar process. KRS 173.710 through KRS 173.800 (emphasis by the Court)."[3]

This case involves a dispute concerning the purported creation of a Public Library District for Carter County, Kentucky, under KRS Chapter 173. The dispute involves a conflict between the statutory vehicles for the creation of such a district, i.e., the "ballot method" set forth in KRS 173.450 through KRS 173.470, and the "petition method" set forth in KRS 173.710 through KRS 173.800.

On April 24, 1979, the Carter County Fiscal Court[4] accepted a petition for an electoral referendum under the ballot method duly presented pursuant to KRS 173.470 and adopted a resolution submitting to the voters of Carter County at the next general election in November the question of the creation of a public library district.

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[3] *Crafton v. Henderson-Henderson County Public Library, supra,* at 83.

[4] Under Kentucky law, the Fiscal Court is the chief governmental body of a County. See Constitution of the Commonwealth of Kentucky, Section 144; KRS67.080; KRS 67.083.

At a special meeting of the Carter County Fiscal Court on May 12, 1979 (the month following the adoption of the resolution for a November referendum), Appellees presented, pursuant to KRS 173.720, a petition for the creation of such a district. Said petition was purported to contain the signatures of 2140 persons, fulfilling the statutory mandate of signatures in excess of 51% of the total number of voters (3837) in the last general election in Carter County. A valid petition under the ballot method prescribed in KRS 173.470 having been accepted the previous month, and having already scheduled an election for the coming November, the Fiscal Court refused to accept Appellees' subsequent petition. No actual examination as to the validity of the alleged signatures was thus made.[5].

The referendum was held at the next regular election (November 6, 1979), and the Carter County voters overwhelmingly rejected the creation of such a district (and the imposition of the attendant tax) by a vote of 2708 to 628. Prior to the election, the Appellees filed suit for injunctive relief in Carter Circuit Court. The action was heard on Motion for Summary Judgment and on September 25, 1979, the trial court entered a Judgment purporting itself to create the library district in question: "There is *hereby created* and established a Carter County Public Library District. . . ." (Emphasis supplied, See Judgment, p. 7 a, *infra.*)

The trial court then ordered the "appropriate County officials and officers" (who were not themselves parties to the litigation) to "take such steps as are required to cause imposition and levy of a special ad valorem tax," to be "turned over to the Board of Trustees of the Carter County Public Library District *hereby* established." (Emphasis supplied, *id.*)

Appellee Library Board appealed, challenging the trial court's failure to impose the tax for 1979. Appellants cross-appealed, challenging the constitutionality of the petition method and the procedural remedy of injunction by which the Respondents had sought relief.

The Kentucky Court of Appeals held for the Library Board, and reversed only that portion of the trial court Judgment delay-

[5]Although 2140 allegedly valid signatures appeared on appellees' petition, it is noteworthy that in the subsequent referendum only 628 votes were cast in favor of the proposal. (There are approximately 11,000 registered voters in Carter County.)

ing the imposition of the ad valorem tax until 1980. See p. 2 a, *infra.*

Appellant Fiscal Court and its members sought discretionary review from the Kentucky Supreme Court, which reversed the Court of Appeals only on the issue of the construction of statutory langauge relating to the commencement date of the ad valorem tax. See p. 1 a, *infra.*

B) How The Federal Question Was Presented

Appellants have consistently maintained from the outset of the dispute that the Petition Method for taxing district organization is unconstitutional, even from the initial presentation to them of Appellees' petition. In their Answer to the Appellee Library Board's Complaint the Carter Circuit Court (the Court of first instance), Appellants clearly raised the federal constitutional questions for which they now seek review.[6]

The trial court in its Findings of Fact, Conclusions of Law and Judgment (see p. 7 a, *infra.*) expressly rejected Appellants' federal constitutional claims by stating: "The method of creation of public library districts by direct petition has been held constitutional. *Boggs v. Reep,* Ky., 404 S.W.2d, 24 (1966); *Wayne Public Library Board of Trustees v. Wayne County Fiscal Court,* Ky. 572 S.W.2d, 858 (1978)."

In their cross-appeal to the Kentucky Court of Appeals, Appellants again raised the federal constitutional issues for which review is now sought, and the said issues were briefed by both

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[6]The minutes of the May 12, 1979, special meeting of the Carter County Fiscal Court at which appellees presented their petition reflect that appellant Fiscal Court member Charles Wilburn made a motion to reject the petition, "and to contest the legality of the petition as unconstitutional." The motion was seconded by appellant member Richard Short, and was then unanimously adopted by the Fiscal Court. See Minutes, p. 11 a, *infra.*

Appellants' trial court Answer states in part:

> "KRS 173.710 *et seq* is in violation of the United States Constitution as it allows a tax to be imposed without a vote of the people or their elected representatives."

Appellants' trial court Response to Motion for Summary Judgment states in part:

> "KRS 173.710 et *et seq* violates the United States Constitution as it is not voted on by the people or their representatives and there is no way to vote against the Library."

sides.[7]. The Court of Appeals in its opinion refused to treat these constitutional questions raised by appellants, stating, "The attack of the cross-appellants upon the constitutionally of KRS 173.720 has been completely foreclosed by the Supreme Court in *Wayne Public Library Board of Trustees v. Wayne County Fiscal Court*, Ky., 572 S.W.2d 858 (1978). The Supreme Court has declared the act to be constitutional and we cannot hold otherwise." See p. 4 a, *infra.*

In their Motion for Discretionary Review to the Supreme Court of Kentucky, Appellants Carter County Fiscal Court and its members again reiterated the federal constitutional questions now sought to be reviewed.[8]

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[7]Appellants' counsel before the Court of Appeals argued in his brief that the Petition Method violated the Fourteenth Amendment's guarantees of equality of opportunity for participation in the democratic process:

> "The United States Supreme Court established the doctrine of 'one man-one vote' in the decision of *Baker v. Carr* 369 U.S. 186. 82 S.Ct. 691, 7 L. Ed.2d. 663 (1962). This decision has had far reaching consequences in every state of the Union. It has been applied to Kentucky in *Hensley v. Wood* 329 F.Supp. 787 (E.D.Ky. 1971).
>
> The Petition method of foming a library district as contained in KRS 173.720 et-seq. purports to follow the 'one man-one vote' theory. It requires registered voters. It requires more than 51% which is a majority. The place it is lacking is it does not allow a no vote. The only no vote can come only three years later based on a different election and then only if no contractual obligations have been assumed by pertinent contracting parties in connection with the library [See KRS 173.800(5)(a)]. Thus if a petition begins to be circulated for "no votes" the library need only borrow some money and the petition to dissolve is defeated."
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> • • •
>
> "KRS 173.720 *et.seq.* is unconstitutional as it purports to require a majority of registered vorters, yet it eliminated any method of voting against, voting no on the tax."

[8]Appellants raised before the Kentucky Supreme Court the federal issues for which review is sought by, *inter alia*, specifically arguing in their Motion for Discretionary Review that "KRS 173.720 violates the First Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States." (Motion for Discretionary Review at p. 10); and further arguing that "such (a)ttempts to limit political participation in the electoral process have consistently been waived as violations of the due process requirements of the Fourteenth Amendment and the Equal Protection Clause of that Amendment."

The Kentucky Supreme Court completely ignored these explicit assertions of Appellants' federal constitutional objections. Since the Kentucky Supreme Court sustained the statute, its silence thus must be perceived as a rejection of Appellants' federal claims. See *Lawrence v. State Tax Commission*, 286 U.S. 276, 282-283 (1932).

Moreover, although not explicitly addressing the federal questions raised by Appellants, the Kentucky Supreme Court had earlier addressed the constitutionality of the challenged "Petition Method" in *Boggs v. Reep, supra*, and *Wayne Public Library Board of Trustees v. Wayne County Fiscal Court, supra* In the latter case, it was announced that "this court declines to entertain further constitutional attacks on KRS 173.710 through KRS 173.800."[9]

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

The question of equality of electoral participation in local democratic decision-making is a substantial one, identifiable in principle but problematic in application.

This case focuses on the extent to which the principle of one person-one vote established in *Reynolds v. Sims*, 377 U.S. 533 (1964) and its progeny [e.g., *Avery v. Midland County*, 390 U.S. 474 (1968); *Hadley v. Junior Colege District*, 397 U.S. 50 (1970)] concerning the selection of the officeholders who will exercise governmental powers and perform governmental functions is applicable to the creation of such powers and such functions. In short, does the Fourteenth Amendment guarantee the same equality and due process in the more basic political decision of office creation as it does in subsequent officeholder selection?

Unlike a limited governmental body whose functions "have a

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[9]The court curiously then stated "this is not to say that such objections raised to similar statutes that do not have an identical history would not be intentional." The "constitutionality by estoppel" approached adopted by the Kentucky Court is not evident in this Court's treatment of Federal constitutional claims raised against other long-standing state statutes. (See *Baker v. Carr*, 369 U.S. 186; and *Brown v. Board of Education*, 347 U.S.483).

A similar statutory provision permitting an even smaller minority of voters to create a special taxing district (for other than library) was held by the Kentucky high court to be "so repugnant to established constitutional principles as to render the act void." *Reid v. Allinder*, Ky., 504 S.W.2d 706 (1974).

clearly disproportionate effect" upon a narrow number of citizens [e.g. *Salyer Land Co. v. Tulane Lake Basin Water Storage District*, 410 U.S.719 (1973)], a governmental body such as the appellee Board concerned with the financing of libraries clearly wields a more general impact. As described by this Court in *Hill v. Stone*, 421 U.S. 289 (1975) at 299, "the construction of a library is not likely to be of special interest to a particular, well-defined portion of the electorate." Rather, it is an adjunct of the educational function which numbers among the widely recognized and widely impacting functions of modern local government. *Hadley v. Junior College District, supra*, at 57; *Kramer v. Union School District*, 395 U.S. 621 (1969).[10]

Furthermore, as recently noted by this Court in *Ball v. James*, 451 U.S.___, 49 U.S.L.W. 4459 at 4462, (1981) the power of a local governmental unit to impose ad valorem taxes can be a key factor in determining whether the district possesses the sort of government power to invoke the strict demands of *Reynolds*.

Statutorily the very *raison d'etre* organizationally of the library district is "*the purpose of levying a tax . . .*" (emphasis supplied) KRS 173.715.

The very statutory purpose of the taxing district at issue herein removes it from the narrow primary purpose and impact of the type of governmental units of *Salyer* and *Ball*, and instead raises substantial federal questions concerning rights of citizen access and participation in a governmental unit of direct and uniform financial impact through ad valorem taxation "over the entire geographic area served by the body." *Avery v. Midland County, supra*, at 485; quoted in *Ball v. James, supra*, at 4461.

Where the local governmental unit proposed to be established has such characteristics, Fourteenth Amendment guarantees should attach to the referendum creating such district as well as subsequent elections. See *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973).[11]

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[10]See Justice Powell's concurring opinion in *Ball v. James*, 451 U.S.____, 49 U.S.L.W. at 4464 (1981), Footnote 1.

[11]The determinative factor in not applying Equal Protection analysis and strict scrutiny in *Associated Enterprizes* was the nature of the governmental unit, not any distinction between referenda and elections.

Clearly KRS 173.720 was meant by the legislature to be a "symmetrical, complete and independent" alternative to the electoral method of library organization previously enacted. *Crafton v. Board of Trustees, Etc., supra* at 83.

The consistent theme of this Court's decisions on the right to electoral participation is that the Constitution requries protection of the right of all citizens from dilution or debasement of their votes. *Hadley v. Junior College District, supra,* at 54-55. As the Court there noted:

> While the particular offices involved in these cases have varied, in each case a constant factor is the decisons of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions.
>
> When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election.

In this case, the State did not choose to give citizens the right to participate directly in the selection of those "certain people who carry out governmental functions."[12] Rather, through the enactment of KRS 173.470, the legislature gave citizens the right to participate individually by ballot in the more basic determination of governmental function itself. The substantial federal question here presented is thus whether any subsequently enacted "symmentrical, complete, and independent" alternative can dilute, debase, or exclude some of those citizens from the alternative determination process.

There is no opportunity afforded in the alternative process of KRS 173.720 for even notice to all eligible voters, much less to accord voters opposed to the taxing district the right to gather a counter-petition. A second substantial federal question also thus exists, arising under the Due Process Clause of the Fourteenth Amendment.

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[12]Once created, the actual trustees of the Library district are appointed by the county judge from a list of recommendations from the Kentucky Department of Libraries. KRS 173.725, p.15 a, *infra.*

In 16A, Corpus Juris Secundum, *Constitutional Law*, Sec. (604) (d) it is generally stated as follows:

> The guaranty of due process of law generally requires that provision be made for some kind of reasonable notice to persons interested in the proceedings for the organization or alteration of a municipal or quasi-municipal corporation; and a statute, resolution or other action is invalid as a denial of due process of law which makes no provision for adequate notice to, or an opportunity to be heard by, n interested owner whose property is included in, or added to, the municipal or quasi-municipal area, with reference to the benefits or damages and the boundaries . . .

A taxing district for public purposes clearly comes within the purview of a "municipal corporation". KRS 173.735 specifically provides that the library district, if created, shall be a body corporate.[13]

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[13] Kentucky has many statutes which provide for the establishment of special taxing districts, similar to that in question before this Court. However, all of these statutes, except the ones providing for the establishment of a mosquito district, KRS 249.540, (which has been declared unconstitutional by the Kentucky Court of Appeals in the case of *Reid v. Allinder*, Ky., 504 S.W. 2d. 706), and the alternate method of creation of a hospital district, KRS 216.517, *et seq.*, provide for discretion on the part of the duly elected and constituted local governing bodies, (i.e. fiscal court or city council), or a submission of the question to a vote of the people and/or some reasonable type of notice to the affected persons followed by a hearing. See KRS 75.010 (establishment of a fire protection district, provides for petition signed by 51% of the *registered* voters filed in Circuit Court Clerk's office, notice pursuant to KRS Chap 424 and opportunity to be heard); KRS 262.700 *et seq.* (establishment of a watershed conservancy district providing for 25 resident landowners' petition, notice and hearing and submission of the question to a referendum); KRS 74.010 (establishment of a water district, requiring petition of 25 resident freeholders, notice pursuant to KRS Chap 424, hearing, determination of the Ky. Public Service Commission of the necessity, and right of appeal); KRS 76.300 *et seq.* (establishment of sewer construction district, requires petition of 25% of resident freeholders, notice pursuant to KRS Chap. 424, hearing, and appellate rights); KRS 268.020 (drainage and reclamation districts, provides for establishment by county and circuit courts, elaborate provisions for notice and hearing); KRS 109.030 (garbage disposal district, provides for establishment by Fiscal Court); KRS 66.613 *et seq.* (establishment of neighborhood improvement district, provides for discretion on the part of the fiscal court); KRS 65.520 (riverport authority, discretion vested in governmental unit); KRS 279.560

The "quasi-election" established under KRS 173.720(1) requiring the number of petiton signers to be only a majority of voters in the last election, not of the total electorate, cannot justify the exclusion of those opposed to the new taxing district, who indeed may constitute not only a plurality but a majority.[14] The legislative attempt to cast electoral legitimacy based upon an *a fortiori* boot strap to the number of participants in the last general election offers no guarantee of majority support, as the returns from the referendum actually held in Carter County on the library tax issue make obvious. As this Court observed in *Hadley v. Junior College District, id*:

> "... (G)ood judgment and common sense tell us that what might be a vital election to one voter might well be a routine one to another. In some instance the election of a local sheriff may be far more important than the election of a United States Senator. If there is any way of determining the importance of choosing a particular governmental official, we think the decision of the State to select that official by popular vote is a strong enough indication that the choice is an important one. This is so because in our country popular election has traditionally been the method followed when governmental by the people is most desired."

The assertion by the Kentucky Supreme Court is *Crafton v. Board of Trustees, supra,* that the petition-created "district may be dissolved by a similar process" is a hollow right, for the Court

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(rural electric and rural telephone cooperative corporations, provides for establishment in the by-laws, only affects members); KRS 108.050 (establishment of an urban service district, provides for referendum).

[14]Here, Appellees are attempting (and have thus far succeeded) in using their subsequently submitted petitions as a blanket to smother the electoral participation of their non-signing fellow citizens in a political decision concerning library creation and ad valorem taxation. The election having already been ordered by the Fiscal Court, such a smothering of the already-scheduled electoral referendum deprived citizens at large of the opportunity of political participation. As pointed out by this Court, there is no right more sacred than that of exercising a choice at the ballot box. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). It is of little constitutional significance that the deprivation of such rights results statutorily rather than administratively.

there held that a library tax district created by petition can be dissolved only by petition.

Such dissolution statutorily will not be permitted at all within three years of the date of the ad valorem tax levy after the creation of the district, and subsequently only if no contractual obligations of pertinent contracting parties "would be adversely affected by such dissolution", or the District has entered certain types of leases. Hence, upon knowledge that a petition is being circulated (but prior to its presentation), hasty new "contractual obligations" or leasing arrangements can guarantee effective perpetuity to the district. KRS 173.800 (5), p.15a, *infra.*

The apparent fears of the effect of constitutional scrutiny of KRS 173.720 upon already-established districts expressed by the Kentucky Supreme Court in a prior case involving this issue (*Wayne Public Library Board of Trustees v. Wayne County Fiscal Court, supra.* at 859) are unfounded. This Court if it desired could merely decline to give retroactive effect to its judgment, as it has done in other cases dealing with voting rights closely tied to financial obligations. See *Hill v. Stone,* supra at 301; *Cipriano v. City of Houma,* 395 U.S. 701, at 706 (1969); *City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970).

If the challanged statute is constitutionally tainted, Carter County citizens need not be denied relief from this Court merely because of the chronological endurance of KRS 173.720 prior to their challenge.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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OF COUNSEL:

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Grayson, Kentucky 42243

APPENDIX

Not to Be Published

Supreme Court of Kentucky

80-SC-690-D

CARTER COUNTY FISCAL COURT ET AL MOVANTS

V. ON REVIEW FROM THE COURT OF APPEALS
NOS. 80-CA-4-MR & 80-CA-241-MR
(Carter Circuit Court No. 79-CI-105)

CARTER COUNTY PUBLIC LIBRARY
DISTRICT, ET AL RESPONDENTS

MEMORANDUM OPINION AND ORDER

REVERSING

The motion of Carter County Fiscal Court, et al, for a review of the decision of the Court of Appeals is granted.

After reviewing the record, we conclude that "the next annual tax bill" as used in KRS 173.720(1) means the tax bill for the next year, which in this case means the tax bill for the year beginning, on January 1, 1980.

The decision of the Court of Appeals is reversed with directions that the judgment of the trial court be reinstated.

All concur.

ENTERED February 17, 1981.

John D. (illegible)
Chief Justice

ATTORNEYS FOR MOVANTS:

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David R. Reeves
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Grayson, Kentucky 41143

ATTORNEY FOR RESPONDENTS:
Robert L. Caummisar
301 West Main Street
Grayson, Kentucky 41143

OPINION RENDERED: September 12, 1980; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

80-CA-4-MR

CARTER COUNTY PUBLIC LIBRARY DISTRICT, BOARD OF TRUSTEES, ROBERT L. CAUMMISAR, EDITH STROTHER, MYRTLE LEMASTER, JANIE QUALLS and SARAH LEWIS, AS TRUSTEES OF THE CARTER COUNTY PUBLIC LIBRARY DISTRICT and INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS — **APPELLANTS**

v. — **APPEAL FROM CARTER CIRCUIT COURT**
HONORABLE RALPH N. WALTER, JUDGE
ACTION NO. 79-CI-105

CARTER COUNTY FISCAL COURT, LOWELL "GENE" CLINE, CARTER COUNTY JUDGE EXECUTIVE, AS ITS CHAIRMAN; CHARLES WILBURN, JAMES WILBURN, JOHNNY PENNINGTON, JASON BRADLEY, RICHARD SHORT, INDIVIDUALLY and AS MEMBERS OF THE CARTER COUNTY FISCAL COURT — **APPELLEES**

AND

80-CA-241-MR

CARTER COUNTY FISCAL COURT, DISTRICT, BOARD OF TRUSTEES — **CROSS-APPELLANTS**

LOWELL "GENE" CLINE, CARTER COUNTY JUDGE EXECUTIVE, AS ITS CHAIRMAN; CHARLES WILBURN, JAMES WILBURN, JOHNNY PENNINGTON, JASON BRADLEY, RICHARD SHORT, INDIVIDUALLY and AS MEMBERS OF

THE CARTER COUNTY FISCAL COURT

v.

CARTER COUNTY PUBLIC LIBRARY

CROSS-APPELLEES

ROBERT L. CAUMMISAR, EDITH STROTHER, MYRTLE LEMASTER, JANIE QUALLS and SARAH LEWIS, AS TRUSTEES OF THE CARTER COUNTY PUBLIC LIBRARY DISTRICT and INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS

REVERSING ON APPEAL
AFFIRMING ON CROSS-APPEAL

REVERSING ON APPEAL
AFFIRMING ON CROSS-APPEAL

BEFORE: LESTER, VANCE and WILHOIT, Judges.

VANCE, JUDGE. This appeal and cross-appeal presents three questions: (1) is KRS 173.720 providing for the organization and funding of library districts constitutional; (2) if so, what is the first year the library district is entitled to receive the tax set forth in the statute; and (3) is a proceeding for a mandatory injunction against a fiscal court a proper method to compel compliance with KRS 173.720.

In May, 1979, a petition signed by more than 51% of the number of registered voters of Carter County who cast ballots in the preceding general election was presented to the Carter County Fiscal Court. It sought establishment of a library district in Carter County pursuant to the provisions of KRS 173.720. A tax rate of four cents per each one hundred dollars of assessed valuation was requested.

The Carter County Fiscal Court rejected the petition and refused to adopt a resolution ordering the levy of the tax. The appellants then filed suit seeking an injunction to require the Fiscal Court to adopt the tax levy. Final judgment was entered on September 25, 1979. The judgment created the library district and

ordered the appropriate officials to take such steps as necessary to impose a special ad valorem tax of four cents per one hundred dollars of assessed valuation. It was ordered, however, that the special tax not be included upon tax bills to be mailed to taxpayers in the calendar year 1979, but that it should be contained on the tax bills mailed in 1980.

The appellants appeal from that part of the judgment which directed the tax levy to be omitted from the 1979 tax bills and cross-appellants have cross-appealed from all portions of the judgment creating the library district and directing the imposition of a tax.

The first matter to be considered is whether the injunction proceeding was proper or whether the order of the Fiscal Court rejecting the petition should have been appealed.

In *Shreve v. Taylor County Public Library Board,* Ky., 419 S.W.2d 779 (1967), it was held that all orders of a fiscal court were appealable under KRS 23.030(1). In *Miller v. Bell,* Ky., 453 S.W.2d 746 (1970) it was held that mandamus was not a proper remedy where a right of appeal existed. Consequently, cross-appellants maintain that an appeal from the Fiscal Court order was the exclusive remedy and that mandamus was not a proper remedy.

The fallacy of that contention is that in 1976 the General Assembly repealed KRS 23.030(1) and we are not cited to any replacement statute which authorizes an appeal from fiscal court orders. Since the Fiscal Court order is no longer appealable, *Miller v. Bell, supra,* is not authoritative.

Under the circumstances of this case, at least, we think mandamus was a proper remedy. One reason cited in *Miller v. Bell, supra,* for requiring the appeal procedure was that it provided a strict time limitation upon the review of fiscal court orders. The present action was instituted within the time in which an appeal could have been taken under KRS 23.030.

The attack of the cross-appellants upon the constitutionality of KRS 173.702 has been completely foreclosed by the Supreme Court in *Wayne County Public Library Board of Trustees v. Wayne County Fiscal Court,* Ky., 572 S.W.2d 858 (1978). The Supreme Court has declared the act to be constitutional and we cannot hold otherwise.

The final question presented concerns the time of the imposition of the tax. The judgment directed that it be omitted from the 1979 tax bill. The statute provides that upon the filing of a proper petition the fiscal court shall adopt a resolution ordering the levy of the special tax and that a certified copy of the order of the fiscal court shall be filed within thirty (30) days with the county clerk who will add the levy to the *next annual tax bill.* KRS 173.720(1).

There is no question here about whether the petition met the standards prescribed by the statute. The levy of the tax requested was not a matter within the discretion of the Fiscal Court, but was mandatorily required by the statute. The resolution of the Fiscal Court was a ministerial act only and public revenues are not to be defeated by the failure of public officers to discharge a mere ministerial duty at the time it should have been discharged. *McFarland v. Georgetown National Bank,* 208 Ky. 7, 270 S.W.2d 995 (1925).

The Library Board was entitled to have the tax added to the next annual tax bill and it cannot be deprived of its funds by reason of the failure of the Fiscal Court to comply with the law of the Commonwealth.

The petition was presented to the Fiscal Court in May, 1979. The tax bills for the year 1979 would normally be mailed in September or October of 1979. Cross-apellants contend that the 1979 tax bill was the current annual tax bill and that the 1980 bill would therefore be the next annual tax bill. Sometimes there is confusion in attempting to differentiate the "next" from the "current", but we must construe the statute so as to give the word "next" its common and ordinary meaning.

Webster's New World Dictionary, Second College Edition, defines "next" as just before or after, nearest, immediately preceding or following, on the first subsequent occasion, etc. The first subsequent tax bill in this case was the 1979 tax bill. It is significant that the tax is to be added to the next annual tax bill rather than be imposed for the next assessment year. We hold that the Library Board was entitled to have the tax added to the 1979 tax bills.

Insofar as it directed that the levy for the Library District be omitted from the 1979 tax bills, the judgment is reversed. A new judgment shall be entered to provide for the collection of the tax on a corrected tax bill for 1979. In all other respects the judgment

is affirmed.

ALL CONCUR.

ATTORNEY FOR APPELLANTS
AND CROSS-APPELLEES:

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ATTORNEY FOR APPELLEES
AND CROSS-APPELLANTS:

David R. Reeves
Post Office Box 326
Grayson, Kentucky 41143

Filed: 09-15-79
Roy T. Gee, Clerk
Carter Circuit Court

CARTER CIRCUIT COURT
CIVIL ACTION NO. 79-CI-105

CARTER COUNTY PUBLIC LIBRARY DISTRICT - BOARD OF TRUSTEES, et al., PLAINTIFFS,

VS: FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

CARTER COUNTY FISCAL COURT, et. al., DEFENDANTS.

* * * * *

This cause coming on for hearing on Plaintiffs Motion for Summary Judgment to which Affidavits in support were attached and upon consideration of Defendants Response to the Motion and oral argument of counsel and the Court being advised, does hereby make the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. Plaintiffs between March 3, 1979 and May 12, 1979 conducted a petition campaign pursuant to KRS 173.710 et seq with purpose of causing creation of a Carter County Public Library District with authority to impose an ad valorem tax of 4¢ per $100 of assessed valuation for the support of the Library District.

2. The legend appearing at the top of each Petition contained the language required by KRS 173.720 (2).

3. The Plaintiffs accumulated 2140 signatures of registered voters of Carter County to the Petitions between March 3, 1979 and May 12, 1979 and the address and date of signing of each petitioner appeared beside his or her name.

4. The November, 1978 election was a general election.

5. The total number of voters in the 1978 general election in Carter County was 3837.

6. The Petitions contained more than 51% of the number of duly qualified voters who voted in the last general election.

7. The Petitions containing the 2140 signatures were certified and filed with the Carter County Fiscal Court on May 12, 1979 and Plaintiffs requested the Defendants to adopt resolution establishing the Carter County public Library District and order-

ing imposition of the 4¢ per $100 tax sought by petitions.

8. Defendants upon motion duly made and seconded in meeting assembled May 12, 1979 unanimously rejected the petitions.

9. Because of the lateness of the date into the tax year, it is found that imposition of the 4¢ per $100 tax on the property bills currently being prepared would work hardship on the office of the Perperty Valuation Administrator and Sheriff and upon delay in sending out the tax bills on all County offices and services relying on prompt mailing of said tax bills.

CONCLUSIONS OF LAW

Plaintiffs are entitled to establishment of a Carter County Public Library District pursuant to KRS 173.720 and the Fiscal Court ought to have enacted resolution so creating the district and ordering levy of a tax of 4¢ on each One Hundred ($100.00) dollar worth of property assessed for local taxation. The method of creation of public library districts by direct petition has been held constitutional, *Boggs v Reep*, Ky., 404 SW 2d, 24 (1966); *Wayne Public Library Board of Trustees v Wayne Fiscal Court*, Ky., 572 SW 2d, 858 (1978). The Fiscal Court having had opportunity to review the petitions for purposes of determining validity of signatures, but having failed to do so on May 12, 1979 or at any time thereafter, has forgone its right to do so at this late date. *Holmes v Hume*, Ky., 424 SW 2d, 824 (1968) and it would be a fruitless venture to order the Fiscal Court to enact resolution creating the district and imposing the tax because of its announced opposition to the District and rejection of the petitions.

The November, 1978 election in Carter County having been available to all registered voters constituted a general election. *Lively v Brown*, Ky., 202 SW 2d, 371 (1947); *Cheanault v Carter*, Ky., 332 SW 2d, 623 (1960).

JUDGMENT

The Court having entered its Findings of Fact and Conclusions of Law does hereby Order and Adjudge as follows:

There is hereby created and established a Carter County public Library District pursuant to KRS 173.720 and the appropriate county officials and offices shall take such steps as are required to cause imposition and levy of a special ad valorem tax of 4¢ per each $100 worth of property assessed for local taxation within the county district for the maintenance and operation of said district.

The special ad valorem tax shall be turned over to the Board of Trustees as governing body of the Carter County Public Library District hereby established. The effective date of the creation and establishment of the District was May 12, 1979.

It is further Ordered and Adjuged that the special levy of 4¢ per $100 of assessed property shall not be contained on the tax bills to be mailed to taxpayers in calender year 1979, but shall be contained on the tax bills to be sent taxpayers in the district in calendar year, 1980.

It is further Ordered that copies of these Findings of Fact, Conclusions of Law and Judgment be served by the Circuit Clerk on Carter County Clerk Ralph Cartee, Carter County Sheriff Joe Kitchen, Carter County Property Valuation Administrator William E. Shaffer in addition to the parties hereto.

_____

JUDGE, CARTER CIRCUIT COURT

ENTERED AND COPIES MAILED TO:

Robert L. Caummisar
Attorney for Plaintiffs
301 West Main Street
Grayson, Kentucky 41143

David R. Reeves
Attorney for Defendants
P. O. Box 326
Grayson, Kentucky 41143

Ralph Cartee
Carter County Court Clerk

Joe Kitchen
Carter County Sheriff

William E. Shaffer

Property Valuation Administrator
This this 25TH day of September, 1979.
/s/ ROY T. GEE

CLERK, CARTER CIRCUIT COURT

ATTEST:—A TRUE COPY
ROY T. GEE, Clerk
CARTER CIRCUIT COURT

BY _____ D.C.

ATTEST:—A TRUE COPY
ROY T. GEE, Clerk
CARTER CIRCUIT COURT

BY _____ D.C.

Exhibit C
Filed: 08-24-79
Roy T.Gee, Clerk
Carter Circuit Clerk

SPECIAL MEETING
CARTER COUNTY FISCAL COURT
MAY 12, 1979
9:30 a.m.

Robert L. Caumissar, representating (*sic*) the Libraries of Carter County, presented to the court a petition signed by 2,140 verified names of registered voters to the court asking the court to levy a 4¢ per hundred dollars of assessment for the Libraries. Mr. Caumissar read the official certification to the court, stating that the petition was duly acquired between the period of March 3, 1979 thru May 12, 1979. This petition was discussed as to the purpose and method by all in attendance. The legality of the petition, time period for certification and or verification of names was brought before the court. Charles Wilburn moved that the court reject said petition, and to contest the legality of the petition as unconstitutional. Motion second by Richard Short, unanimous vote of the court. Therefore, Mr. Caumissar left the petition with the Clerk of the Fiscal Court to retain.

S/S Lowell E. Cline
.....
Judge Executive of Carter County

I, Mary A. McCoy, Clerk of the Carter Fiscal Court, do certify that the foregoing is a true and correct copy of the minutes of the Carter County Fiscal Court as recorded in Book 8, Page 77 of the Fiscal Court Order Book.

This the 22 day of August, 1979.

.....
Mary A. McCoy, Clerk

SUPREME COURT OF KENTUCKY
ACTION NO. 80-SC-690-D

FILED

MAY 15, 1981

JOHN C. SCOTT,
CLERK
SUPREME COURT

CARTER COUNTY FISCAL COURT, LOWELL "GENE" CLINE, CARTER COUNTY JUDGE EXECUTIVE, AS ITS CHAIRMAN: CHARLES WILBURN, JAMES WILBURN, JOHN PENNINGTON, JASON BRADLEY, RICHARD SHORT, INDIVIDUALLY AND AS MEMBERS OF THE CARTER COUNTY FISCAL COURT

ON REVIEW FROM THE COURT OF APPEALS
vs. NOS. 80-CA-4-MR & 80-CA-241-MR
(Carter Circuit Court No. 79-CI-105)

CARTER COUNTY PUBLIC LIBRARY DISTRICT, BOARD OF TRUSTEES, ROBERT L. CAUMMISAR, EDITH STROTHER, MYRTLE LEMASTER, JANIE QUALLS AND SARAH LEWIS, AS TRUSTEES OF THE CARTER COUNTY PUBLIC LIBRARY DISTRICT and INDIVIDUALLY, AND AS REPRESENTATIVE OF A CLASS. APPELLEES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

* * * * * * * * * * * * *

Notice is hereby given that Carter County Fiscal Court, Lowell "Gene" Cline, Carter County Judge Executive, as its chairman; Charles Wilburn, James Wilburn, John Pennington, Jason Bradley, Richard Short, Individually and as Members of the Carter County Fiscal Court, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Kentucky, being a Memorandum Opinion and Order reinstating the judgment of the trial court and entered herein on February 17, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

AMSHOFF & AMSHOFF

By: /s/ Theodore H. Amshoff, Jr.
1445 Starks Building
455 Fourth Avenue
Louisville, Kentucky 40202
Phone: (502) 582-2419
Counsel for Appellants

CERTIFICATE

I hereby certify that copies of the foregoing Notice of Appeal to the Supreme Court of the United States were served by mail first class postage prepaid upon Robert L. Caummisar, Esq., Attorney for Appellees, 301 West Main Street, Grayson, Kentucky 41143; and to the Honorable John C. Scott, Clerk, Kentucky Court of Appeals, Bush Building, 403 Wapping Street, Frankfort, Kentucky 40601; and to the Hon. Ralph Walter, Judge, Carter Circuit Court, and the Hon. Roy Gee, Clerk, Carter Circuit Court, Carter County Courthouse, Grayson, Kentucky, 41143, this 15th day of May, 1981.

/s/ Theodore H. Amshoff, Jr.

PUBLIC LIBRARY DISTRICTS

173.450. Definitions for KRS 173.450 to 173.650 – (1) "District" means "public library district"; and

(2) "Board" means the board of trustees of a public library district. (Enact. Acts 1960, ch. 114, § 1; 1972, ch. 223, § 7.)

173.470. Organization – Procedure – Special tax. – Districts shall be organized in the following manner:

(1) Upon the filing of a duly certified petition of one hundred (100) or more duly qualified voters in each county to be included within the territorial limits of the proposed district, the fiscal court of each county in the proposed district shall adopt a resolution submitting to the qualified voters of the county the question as to whether a public district should be established for the area and a special ad valorem tax imposed for the maintenance and operation of the district, not to exceed twenty cents (20¢) on each one hundred dollars ($100) of the assessed valuation of all property in the district. A certified copy of the order of the fiscal court shall be filed with the county clerk at least sixty (60) days prior to the next regular election and thereupon the clerk shall cause the question to be placed upon the ballot.

(2) The question shall be in substantially the following form: "Are you in favor of establishing a public library district for (insert names of counties) which shall have the authority to impose a special ad valorem tax of (insert exact amount) on each one hundred dollars ($100) worth of property assessed for local taxation in the district for the maintenance and operation of the (insert name) public library district?"

(3) If a majority of those voting in each county on the question favor the establishment of a public library district it shall be so established and shall constitute and be a taxing district within the meaning of section 157 of the constitution of Kentucky.

(4) All special ad valorem taxes authorized by KRS 173.450 to 173.650 shall be collected in the same manner as are other county ad valorem taxes in each county affected and shall be turned over to the board as the governing body of the district. The

special ad valorem tax shall be in addition to all other ad valorem taxes. (Enact. Acts 1960, ch. 114, § 3; 1962, ch. 71; 1964, ch. 55, § 4; 1978, ch. 384, § 296, effective June 17, 1978.)

LIBRARY DISTRICTS FORMED BY PETITION

173.710. Definitions for KRS 173.710 to 173.810 – (1) "District" means "public library district";

173.735. Corporate name – Seal – Officers – Treasurer's bond – Meetings – Quorum – Each board shall be a body corporate under the name and style of ". . . Public Library District Board of Trustees." The members shall, as soon as possible after their appointment, adopt a seal and organize by electing a president, a secretary and a treasurer, each to serve for a term of two (2) years and until his successor is elected and qualified. The treasurer shall give bond to the Commonwealth for the faithful performance of his duties, in such sum and form and with such sureties as the board shall approve. The board shall meet on a regularly scheduled basis once each month. A majority of the board shall constitute a quorum. (Enact. Acts 1964, ch. 92, § 6, 1974, ch. 8, § 9.)

173.725. Library board – Members, number, appointment – (1) Upon the creation of a district, the fiscal court of each county in the district shall at once notify the department of library and archives of the establishment of the district. The department of library and archives shall then recommend to the county judge/executive of each county in the district the names of suitable persons from that county to be appointed to the board. The department of library and archives in recommending persons to the county judge/executive for appointment to the board shall recommend twice as many persons for each county as the county is entitled to have members appointed, and the county judge/executive shall immediately make his selection from those recommended. Where the district consists of one (1) county, the county judge/executive shall appoint five (5) persons from that county as members. The department of library and archives shall prescribe by regulation the number of board members when the district consists of more than one (1) county, provided that the board shall consist of not less than one (1) nor more than four (4) members from each county, each county

having such number of members as the proportion of its population bears to the total population in the district, and that the total membership of the board consist of not less than five (5) members. Where a county joins an already established district, the department of library and archives shall recommend to the county judge/executive of each county included in the new district twice as many persons for appointment to the board as the county is entitled to have appointed, and the county judge/executive shall select the members for his county from this list. The terms of the members of the counties composing the previously existing district shall expire immediately upon the organization of the new board.

(2) In making recommendations and appointments under subsection (1) of this section and KRS 173.730, the department of library and archives and the county judge/executive shall attempt to assure, to the extent permitted by the county's entitlement to board members, that the board includes members from different geographical areas, and from both cities and unincorporated areas, of the county. (Enact. Acts 1964, ch. 92, § 4; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1978; 1980, ch. 18, § 17, effective July 15, 1980; 1980, ch. 167, § 3, effective July 15, 1980.)

173.800. Dissolution of district, procedure – A district may be dissolved in the following manner:

(1) Upon filing of a duly certified petition of fifty-one percent (51%) of the number of qualified voters who voted in the last general election in the district, the fiscal court of each county in the district shall adopt a resolution to dissolve a library district.

(2) The petition shall be in substantially the following form: "The following qualified voters in (insert name of county or counties) favor dissolving the (insert name of district) public library district." It shall be presented to the fiscal court within ninety (90) days after having been signed by the first petitioner.

(3) A certified copy of the order of the fiscal court shall be filed with the county clerk.

(4) The county clerk or clerks in the district will thereupon remove the tax levy from the tax bills of the property owners of the district and the district shall be dissolved.

(5) A petition for dissolution will not be considered of any legal effect if, at any time prior to the filing of such a petiton for dissolution, either:

(a) Contractual obligations have been assumed by pertinent contracting parties in connection with said subject library, which contractual obligations would be adversely affected by any such dissolution; or

(b) If, as of the time of filing of such a petition for dissolution, the board of such district shall have arranged for the financing of a library in that district pursuant to a plan of financing involving a lease of that library to the board under which lease the board is not bound for more than one (1) year at a time without exercising an annual option to renew the lease and such lease remains effective and has not been terminated; or

(c) If less than three (3) years have passed since the certified copy of the order of the fiscal court ordering the levy of the tax was filed with the county clerk.

(6) After all contractual obligations, existing prior to the time of the attempted filing of such petition for dissolution, have been satisfied, then, at such time, a petition for dissolution may be effectively filed under this section, provided that other provisions of this section are complied with. (Enact. Acts 1964, ch. 92, § 19; 1966, ch. 154; 1970, ch. 241, § 8; 1972, ch. 223. § 11; 1978, ch. 384, § 300, effective June 17, 1978.)

Office-Supreme Court, U.S.
FILED
JUN 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CARTER COUNTY FISCAL COURT, LOWELL "GENE" CLINE, CARTER COUNTY JUDGE-EXECUTIVE, AS ITS CHAIRMAN: CHARLES WILBURN, JAMES WILBURN, JOHN PENNINGTON, JASON BRADLEY, RICHARD SHORT, INDIVIDUALLY and AS MEMBERS OF THE CARTER COUNTY FISCAL COURT,

Appellants,

vs.

CARTER COUNTY PUBLIC LIBRARY DISTRICT, BOARD OF TRUSTEES, ROBERT L. CAUMMISAR, EDITH STROTHER, MYRTLE LEMASTER, JANIE QUALLS and SARAH LEWIS, AS TRUSTEES OF THE CARTER COUNTY PUBLIC LIBRARY DISTRICT and INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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Counsel for Appellees

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1955

CARTER COUNTY FISCAL COURT, LOWELL "GENE" CLINE, CARTER COUNTY JUDGE-EXECUTIVE, AS ITS CHAIRMAN: CHARLES WILBURN, JAMES WILBURN, JOHN PENNINGTON, JASON BRADLEY, RICHARD SHORT, INDIVIDUALLY and AS MEMBERS OF THE CARTER COUNTY FISCAL COURT,

Appellants,

vs.

CARTER COUNTY PUBLIC LIBRARY DISTRICT, BOARD OF TRUSTEES, ROBERT L. CAUMMISAR, EDITH STROTHER, MYRTLE LEMASTER, JANIE QUALLS and SARAH LEWIS, AS TRUSTEES OF THE CARTER COUNTY PUBLIC LIBRARY DISTRICT and INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

MOTION OF APPELLEES TO DISMISS OR AFFIRM

The Appeal of Appellants herein ought be dismissed for the following reasons:

FAILURE OF SERVICE

Appellants have failed to comply with Rule 28.4(c) of this Honorable Court by failing to cause service of its initial pleading, motion or paper in this Court on the Attorney General of the Commonwealth of Kentucky.

Appellants clearly call in question the constitutionality of a Kentucky Statute, K.R.S. 173.710 *et seq.*, under which the majority of public library districts in Kentucky have been established, and the chief law enforcement agent of the Commonwealth has a definite interest in upholding the laws of the Commonwealth in this regard.

FAILURE TO RAISE AND PRESENT FEDERAL ISSUE IN STATE COURT

Appellants attempt to gain reversal of the Memorandum Opinion and Order Reversing entered by the Kentucky Supreme Court on February 17, 1981, as found in Appellant's Jurisdictional Statement at page 1a.

That Opinion and Order did not recite it was addressing any federal issue raised by Appellants herein. The Opinion and Order reinstated the judgment of the trial court. The Judgment of the trial court (Appellants' Jurisdictional Statement page 7a-9a) upheld establishment of the Carter County Public Library District based on two Kentucky case decisions, *Boggs* v. *Reep*, Ky., 404 SW 2d 24 (1966); *Wayne Public Library Board of Trustees* v. *Wayne Fiscal Court*, Ky., 572 SW 2d 858 (1978). In neither of these cases did the state's highest court rule on the federal constitutionality of the Kentucky statutory scheme for library creation and support by direct petition method.

Appellants' claims of raising federal constitutional issues prior to reaching this Court are incorrect. Though Appellant's Jurisdictional Statement at pages 7, 8 and 9 recites barest conclusionary statements as to violation of the federal constitution, all such references were ultimately pegged to the inapposite case of *Baker* v. *Carr*, 369 U.S. 186 (1962) and its progeny. Though Appellants actually would have more correctly pointed to *Reynolds* v. *Sims*, 377 U.S. 533 (1964), even that true "one man-one vote" decision is inapplicable to the facts of library district creation by direct petition method. In *Lockport* v. *Citizens for Community Action*, 430 U.S. 259 (1977) it was held the "one person-one vote" doctrine of *Reynolds* v. *Sims*, *supra*, is applicable only to elections where representatives are selected but not applicable in a "one shot" single issue referendum, to which library creation by direct petition is akin.

Appellants neither obtained nor filed with this Court a certificate from the Kentucky Supreme Court to the effect that a federal question was raised and decided. In the absence of such, this court is forced into doubt and conjecture as to whether a federal constitutional issue was properly raised and decided by the state court, and must make that dermination itself (see generally discussion in *Supreme Court Practice*, pg. 224-230).

In light of *Lockport*, *supra*, and the line of cases beginning with *Salyers Land Co.* v. *Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) allowing creation of districts with government powers and election of district directors without resort to one person-one vote principles, Appellees herein maintain Appellants did not raise a constitutional issue in the state courts necessarily precedent to taking this action under 28 USCA 1257(b).

To assist the court in determining whether Appellants raised a federal issue decided by state courts, Appellees direct attention of this Court to *Equitable Life Assurance Society of the United States* v. *Brown*, 187 U.S. 308 (1902) wherein it was held the mere formal allegation of having raised a federal issue in the court below is insufficient to confer jurisdiction on this Court, when herein, as in *Equitable, supra,*

> ". . . That question when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this Court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit."

THE FEDERAL ISSUE IS NOT SUBSTANTIAL

Appellants do not point to a single case, state or federal, wherein it has been held a direct petition (requiring signatures of 51% of registered voters based on last previous general election) method of creation of a limited taxing district, library or otherwise, has been ruled unconstitutional under state or federal law.

The Appellants cite many cases to support their position, but none of them address the issue here involved. *Reynolds* v. *Sims*, 377 U.S. 233 (1964); *Avery* v. *Midland County*, 390 U.S. 474 (1968); *Halley* v. *Junior College District*, 397 U.S. 50 (1970); *Kramer* v. *Union School District*, 395 U.S. 621 (1969) all had to do with elected officials.

The line of cases beginning with *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) and including *Associated Enterprises, Inc.* v. *Tultec*

Watershed Improvement District, 410 U.S. 743 (1973) and most recently *Ball* v. *James*, 101 S. Ct. 1811 (1981) carve out an exception to one person-one vote principle when it comes to creating special districts pursuant to state laws, or selecting the directors of those special districts.

As stated by the majority in *Ball* v. *James, supra:*

> ". . . The District simply does not exercise the sort of government powers that invoke the strict demands of *Reynolds*. The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health or welfare services."

Certainly a county library district system pursuant to K.R.S. 173.710 *et seq.* has none of the powers invoking the stricter standards of *Reynolds, supra.* It cannot impose any taxes, cannot control citizens, provides only the one service frequently (but even then, not always) provided by government. Its directors are not elected by the registered voters, nor by any voters under any peculiar formula, but are appointed by the elected chief executive officer of the district boundaries — the County Judge/Executive.

Appellees are struck by the cogency of the concurring opinion of Justice Powell in *Ball* v. *James, supra,* at 1821 wherein he states:

> "Our cases have recognized the necessity of permitting experimentation with political structures to meet the often novel problems confronting local communities. . . As this case il-

> lustrates, it may be difficult to decide when experimentation and political compromise have resulted in an impermissible delegation of those governmental powers that generally affect all of the people to a body with a selective electorate. But State legislatures responsive to the interests of all the people, normally are better qualified to make this judgment than federal courts. Given the broad reform effected by *Reynold* v. *Sims* we should expect that a legislature elected on the rule of one person, one vote will be vigilant to prevent undue concentration of power in the hands of undemocratic bodies."

The Kentucky State legislature which enacted K.R.S. 173.710 *et seq.* allowed no undue concentration of power in the hands of an undemocratic body. In fact the direct petition method successfully used by the library supporters of Carter County was as pure and direct participatory democracy in action as any could imagine, with the possible exception of the history laden New England Town Meetings (See *The New England Town Meeting,* New Hampshire Bar Journal, 17:210-37 Je. 1976, Lewis Soule).

Each of the 2140 registered voters of Carter County who signed the carefully drawn petitions knew he was signing on the dotted line to self impose a small ad valorem tax to support a library system. All registered voters who opposed the library system voted "no" by the simple expedient of refusing to sign the Petition when presented. Even those several thousand voters who were not approached by the library supporters after the 51% majority had been obtained voted "no".

The library supporters could easily have obtained more than the 2140 signatures obtained. Note, the Petitions

were filed on May 12, 1979, after having first signature obtained March 3, 1979. Under K.R.S. 173.720(1) library supporters had over two weeks in which to gather more signatures if necessary. As it was the Petitions contained a percentage well above the 51% of the number, based on last general election, as required.

Appellants make much of the ballot referendum held in November 1979 to show the unpopularity of the library. What Appellants fail to confide is that the library supporters made not one effort nor spent one penny to encourage an affirmative vote in the November 1979 referendum. Why? Because a library district for Carter County imposing a 4¢ per $100 ad valorem tax had already been created by the delivery in May of that year to the Fiscal Court of the certified petitions. In September, 1979 the correctness of the Petitioner's actions and establishment of the Library District was confirmed by the Carter County Circuit Court. Had the November 1979 election referendum succeeded, the end result would have been two library districts for Carter County, and two taxes which not even the most ardent library supporters thought necessary.

Even under Appellants own arguments the November 1979 referendum in which 2708 voters voted "no" as to question of a second library district creation is meaningless. inasmuch as the county has approximately 11,000 registered voters and less than a third of them voted against creation of the library district.

The New England Town Meeting model is the closest analogous method of direct citizen decision making in matters of public policy with which Appellees are acquainted. As early as 1641 in Paragraph 66 of *The Body of Liberties* adopted by The Massachusetts Bay Colony it was written, "The Freeman of every Township shall have

power to make such by laws and constitutions as may concern the welfare of their Towne (historic spelling) (The New Hampshire Town Meeting, op. cit. at 213).

As late as 1976 the efficacy of direct public participation in determining public policy was upheld in *McDonnell* v. *Town of Derry,* 350 A 2d 620 (1976).

By 1975 New Hampshire law called for a bifurcated process of Town decision making. By ballot. The citizens of Derry decided to limit salaries of city officials to less than $15,000.00. The vote so limiting was 1494 to 1369. Eleven days later at the annual deliberative town meeting, with only approximately 300 citizens in attendance, the town budget was adopted which contained salary levels in excess of $15,000. In upholding the higher salaries the New Hampshire Court relied on the doctrine that a town meeting may reconsider a matter on which it has already decided.

Similarly to New Hampshire, the Kentucky General Assembly in enacting a direct petition library creation method (K.R.S. 173.710) as well as a ballot method (K.R.S. 173.470) has appropriately allowed direct citizen participation in two different ways, each of which is whole and entire in its own right.

CONCLUSION

WHEREFORE Appellees respectfully move dismissal of the cause herein as contrary to Rules of this Court; as the case presents no substantial federal question; that any such federal question was not timely or properly raised and was not expressly passed on, and that the Kentucky decision rests on an adequate non-federal basis. This court ought to decline jurisdiction.

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Office-Supreme Court, U.S.
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No. 80-1955

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARTER COUNTY FISCAL COURT, LOWELL "GENE" CLINE, Carter County Judge-Executive, as its Chairman;
CHARLES WILBURN, JAMES WILBURN, JOHN PENNINGTON, JASON BRADLEY, RICHARD SHORT, Individually and as Members of the Carter County Fiscal Court - Appellants

versus

CARTER COUNTY PUBLIC LIBRARY DISTRICT, BOARD OF TRUSTEES, ROBERT L. CAUMMISAR, EDITH STROTHER, MYRTLE LEMASTER, JANIE QUALLS and SARAH LEWIS, as Trustees of the Carter County Public Library District, Individually and as Representatives of a Class - - - Appellees

On Appeal From the Supreme Court of Kentucky

APPELLANTS' REPLY BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1955

CARTER COUNTY FISCAL COURT, LOWELL "GENE" CLINE, Carter County Judge-Executive, as its Chairman; CHARLES WILBURN, JAMES WILBURN, JOHN PENNINGTON, JASON BRADLEY, RICHARD SHORT, Individually and as Members of the Carter County Fiscal Court - - - - - - - - *Appellants*

v.

CARTER COUNTY PUBLIC LIBRARY DISTRICT, BOARD OF TRUSTEES, ROBERT L. CAUMMISAR, EDITH STROTHER, MYRTLE LEMASTER, JANIE QUALLS and SARAH LEWIS, as Trustees of the Carter County Public Library District, Individually and as Representatives of a Class - - *Appellees*

On Appeal From the Supreme Court of Kentucky

APPELLANTS' REPLY BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Come the Appellants, Carter County Fiscal Court, Lowell "Gene" Cline, Carter County Judge Executive, as its Chairman; Charles Wilburn, James Wilburn, John Pennington, Jason Bradley, Richard Short, individually and as members of the Carter County Fiscal Court, by counsel, and in opposition to Appellees' Motion to Dismiss or Affirm, state the following:

Appellees in their Motion to Dismiss or Affirm raise the following claims:

(1) Failure of service;
(2) Failure to raise or present federal issues in state court;
(3) Insubstantiability of federal issues.

Appellants respectfully maintain that all of the foregoing allegations of Appellees are without merit.

I. There Has Been No Failure of Service Because the Parties Are Agents, Officers and Employees of the Commonwealth of Kentucky.

Appellees' contention that this appeal should be dismissed for failure to comply with Rule 28.4(c) is without merit. Said Rule by its terms is applicable only where "the state or any agency, officer, or employee thereof is not a party." Because of this clear exception within the rule, lack of service on the Attorney General does not constitute grounds for dismissal of the action.

Under Kenutcky law, "a county is but an arm or branch of the state government." *Monroe County* v. *Rouse,* Ky., 274 S. W. 2d 477, 478 (1955) following *Downing* v. *Mason Co.,* 87 Ky. 208, 8 S. W. 264 (1888). Counties in Kentucky constitute the "basic subdivisions of the Commonwealth." *Holsclaw* v. *Stevens,* Ky., 507 S. W. 2d 462, 475 (1974).

In this case, the Appellant, Carter County Fiscal Court, is a constitutionally prescribed office of the

Commonwealth of Kentucky, and the appellant members thereof are the holders of constitutionally mandated public office of the Commonwealth of Kentucky. (Constitution of the Commonwealth of Kentucky, §99 and §144.) Appellants' duties in the management of the County are set forth in KRS 67.080.

As a governmental body and as individual office holders of the Commonwealth of Kentucky, Rule 28.4 (c) is clearly inapplicable inasmuch as Appellants are agencies, officers, or employees of the State; as indeed are Appellees themselves as office holders of a statutorily organized taxing district of the Commonwealth of Kentucky under §157 of the Kentucky Constitution. [See KRS 173.470(3).] Appellees' arguments regarding service are thus clearly meritless under Kentucky law.

II. Appellants Clearly Raised and Presented the Federal Issue in State Court.

Although the Supreme Court of Kentucky indeed failed to address the Federal issues raised by Appellants, said issues have been clearly raised by them throughout this litigation. The proper raising of said issues below is detailed at pp. 7-8 of their Jurisdictional Statement, and especially in footnotes 6, 7 and 8 therein.[1]

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[1]e.g., Before the Kentucky Supreme Court, Appellants specifically argued:

"KRS 173.720 violates the First Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitu-

(Footnote continued on next page)

Despite the raising of such Federal issues, the Kentucky Supreme Court failed to rule thereon, apparently in keeping with its earlier pronouncement that "this court declines to entertain further constitutional attacks on KRS 173.710 through KRS 173.800." *Wayne Public Library Board of Trustees* v. *Wayne County Fiscal Court,* Ky., 572 S. W. 2d 858, 859 (1978).

III. The Federal Questions Are Substantial.

Appellees maintain (Motion to Dismiss or Affirm, pp. 4-8) that the Federal issues are insubstantial, claiming that the petition method of tax district creation "was as pure and direct participatory democracy as any could imagine," and analogizing the creation of the tax district in question to a New England town meeting. Appellees' attempt to so clothe the stifling of electoral participation with the robe of New England democracy is an ill-fitting cloak. As noted by the Supreme Judicial Court of Massachusetts in *Opinion of the Justices,* 229 Mass. 601, 607, 119 N. E. 778, 781 (1918):

> "The essential and distinguishing characteristic of the town meeting form of government is that

---

(Footnote continued from preceding page)

tion of the United States, as well as the Equal Protection Clause.

. . .

"Attempts to limit political participation in the electoral process have consistently been viewed as violations of the due process requirements of the Fourteenth Amendment and the Equal Protection Clause of that Amendment." (Motion for Discretionary Review, No. 80-SC-690D, pp. 10, 12.)

> 'all the qualified inhabitants meet, deliberate, act and vote in their natural and personal capacities, in the exercise of their corporate powers.' (Citation omitted). Each qualified inhabitant of the town has an indisputable right to vote upon every question presented as well as to discuss it, or there is no town meeting."

It is the failure to accord such notice and such opportunity of electoral participation to all the qualified inhabitants who constitute the Carter County electorate which renders the challenged statutes repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[2]

Appellees' attempt to distinguish *Reynolds* v. *Sims*, 377 U. S. 233 (1964); *Avery* v. *Midland County*, 390 U. S. 474 (1968); *Hadley* v. *Junior College District*, 397 U. S. 50 (1970); and *Kramer* v. *Union School District*, 395 U. S. 621 (1969) on the basis that such cases dealt with elected officials amounts to a distinction without a difference. Any distinction which might exist inures to support Appellants' claims, rather than

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[2]Of the 11,000 registered voters described by Appellees in their Motion to Dismiss or Affirm (at p. 7), only 2,140 signed Appellees' petitions. The constitutional infirmity of Appellees' argument is readily apparent. If, as conceded in their Motion (at p. 6), "all registered voters who opposed the library system voted 'no' by the simple expedient of refusing to sign the petition when presented" and "even those several thousand voters who were not approached by the library supporters after the 51% *majority* had been obtained voted 'no'" (emphasis supplied), then it is evident that the 2,140 registered voters signing the petition are not in fact a 51% "majority" of the 11,000 registered voters of Carter County. Appellees do not even assert that a majority of such voters as much as had notice of the circulation of the petitions in question, much less an opportunity to participate in the process.

Appellees', because the statutes herein challenged do not deal with the mere election of those who will administer governmental power and hold governmental office. Rather, they circumvent electoral notice and participation in the more fundamental political decision concerning the very creation of such governmental power and office.

For the reasons heretofore set forth in their Jurisdictional Statement, Appellees respectfully submit that it is apparent that substantial Federal issues are herein presented.

CONCLUSION

The motion of Appellees to dismiss or affirm should be overruled, and the Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Commonwealth of Kentucky
Jefferson County } SS

On this 14th day of August 1981, before me, a Notary Public for the State of Kentucky and Jefferson County, the undersigned Theodore H. Amshoff, Jr., personally appeared and, being duly sworn according to law, did depose and say that he mailed today, by first-class postage pre-paid mail, three copies of the Brief of the Carter County Fiscal Court on appeal from the Supreme Court of Kentucky to the following:

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Theodore H. Amshoff, Jr.

Sworn To and Subscribed before me the day and year aforesaid.

Notary Public, State at Large, Ky.